

11-30-2015

# Mayer v. TPC Holding, Inc. Appellant's Reply Brief Dckt. 43468

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**IN THE SUPREME COURT FOR THE STATE OF IDAHO**

TPC Holdings, Inc.,	)	Supreme Court No. 43468-2015
	)	
Employer,	)	
	)	
and	)	
	)	
Liberty Northwest Insurance Corp,	)	
	)	
Surety,	)	
	)	
Defendants/Appellants,	)	
	)	
vs.	)	
	)	
Keith Mayer,	)	
	)	
Claimant/Respondent.	)	

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**REPLY BRIEF OF DEFENDANTS/APPELLANTS  
TPC HOLDINGS, INC. AND LIBERTY NORTHWEST INSURANCE CORP..**

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**APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

**R.D. MAYNARD, CHAIRMAN**

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## ARGUMENT

The goal of damages is to make a plaintiff whole. Workers' Compensation law, with its references to a "whole man," reflects this familiar concept. Permanent disability recognizes that some work injuries are significant enough to impact a worker's earning capacity, and when this occurs, a worker is deserving of compensation to offset this future wage loss. A rating of permanent disability is an appraisal of the injured worker's *present and future* ability to engage in gainful activity. Idaho Code § 72-425.

Idaho's civil survivorship statute limits lost earnings to those actually suffered prior to a plaintiff's death. *See* Idaho Code § 5-327(2). This is consistent with the legal tenet that damages are intended to make a plaintiff whole, as none of us have a work life expectancy that exceeds death.

Workers' Compensation provides a narrower scope of remedies than a tort action. Many forms of relief that are recognized in tort are not allowed under Workers' Compensation, such as loss of consortium. "In compensation, unlike tort, the only injuries compensated for are those which either actually or presumptively produce disability and thereby presumably affect earning power." 1-1 *Larson's Workers' Compensation Law* § 1.03 at [4] (2015). Claimant asks this Court to provide him with a remedy that would be unavailable in civil law, in a system that has historically provided far fewer forms of relief. Moreover, Claimant requests a remedy for a loss of earning power for a party who has no present or future earning power. This is contrary to the fundamental purposes of Workers' Compensation.

The distinction between Workers' Compensation and torts is seen most clearly in the area of liability. Workers' Compensation is a no-fault system, and "the test is not the relation of an

individual's personal quality (fault) to an event, but the relationship of an event to an employment.” *Larson's*, § 1.03 at [1]. The no-fault nature of Workers’ Compensation is reflected in an award for permanent partial impairment. A permanent impairment rating is typically provided upon a claimant reaching medical stability and payment becomes due soon after. There is no fact-finding or adjudication required to trigger a surety’s payment obligation. As the Court said in *Thacker v. Jerome Co-op. Creamery*, referring to permanent impairment, ‘the award does not fix the right to, only determines, the amount of compensation for the injury. The right to compensation is fixed by statute, the amount is merely an administrative detail.” 61 Idaho 726, 26, 106 P.2d 863, 865 (1940) (quoting *City of Milwaukee v. Roth*, 185 Wis. 307, 201 N.W. 251, 252 (1924).)

Permanent partial disability in excess of impairment is a different creature. This concept recognizes that in some cases, a worker’s loss of earning capacity is not adequately remedied by an impairment rating and more compensation is due based upon personal characteristics of the worker. An award of permanent partial disability in excess of impairment is always based on personal characteristics of a worker using the pertinent non-medical factors set forth in Idaho Code § 72-430 because this is the only scenario in which disability would exceed impairment. In other words, permanent disability in excess of impairment by its very nature requires a formal fact-finding process to be determined. Because it is based upon characteristics personal to a claimant, permanent partial disability in excess of impairment cannot become a liquidated award until a formal fact-finding occurs, or it is stipulated by the parties. Claimant argues that permanent partial disability in excess of impairment is similar to permanent impairment because it is also granted by statute. This is incorrect. While a claimant with a compensable work injury is always entitled to an

impairment award, a claimant is only entitled to an award for permanent disability in excess of impairment upon an evidentiary showing. *See e.g., McCabe by JoAnn Stores, Inc.*, 145 Idaho 91, 96, 175 P.3d 780, 785 (2007). In the present case, any permanent disability in excess of impairment is unspecified because no determination was made prior to Claimant's death.

Idaho Code § 72-431 is a survivorship statute. It provides survivors with a mechanism to sue for enforcement of a liquidated award, and gives an order of succession. It is nothing more, and this is evidenced plainly of the face of the statute which limits its applicability to benefits "*specified and unpaid*." The statute was never intended to confer the type of award Claimant is now requesting from this Court.

In briefing, Claimant failed to address the most fundamental issue before the Court- what, specifically, is meant by "specified and unpaid"? The term "specified and unpaid" is a modifier on the noun "income benefits," which functions grammatically to restrict the broader category of "income benefits." If the Legislature had intended the statute to apply to the type of award Claimant seeks, it would never have imposed limiting language. "The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition." Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 174 (2012). Claimant attempts to apply § 72-431 to a broader class of "income benefits" than those provided for in the statute, and in so doing is asking this Court to subtract key language that changes the meaning of the text.

Defendants paid Claimant's permanent impairment award in full. (R., Vol. 1, p. 8). Claimant seeks to recover an unwarranted disability compensation windfall through benefits for a loss of earning capacity by party who has no present and future ability to earn wages. In doing so,



Claimant relies upon an interpretation of § 72-431 that is contrary to the language of the statute and Idaho case law.

**1. Claimant is not entitled to attorney fees on appeal**

Claimant is not entitled to attorney fees on appeal because this is a case of first impression. A case of first impression does not constitute an area of settled law; therefore, a request for attorney fees should be denied. *Purco Fleet Services, Inc., v. Idaho State Department of Finance*, 140 Idaho 121, 126, 90 P.3d 346, 352 (2004). *Accord, Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 207 P.3d 988 (2009).

Prior to this case, the Court has not been presented with the question of what benefits survive the death of an injured worker for reasons unrelated to the industrial injury by interpreting the text of Idaho Code § 72-431. Claimant argues this Court conclusively addressed Idaho Code § 72-431 prior to this case, in *Palomo v. J.R. Simplot Company*. 31 Idaho 314, 955 P.2d 1093 (1998). *Respondent's Brief* at p. 7. Defendants disagree. The question presented to the Court in *Palomo* was whether two sureties that entered into a joint stipulation that a claimant was totally and permanently disabled were required to continue payments after her death. *Id.* at 315, 1094. The Court simply said that § 72-431 did not apply because the parties stipulated that the claimant was totally and permanently disabled: “the statute is specific in referring only to whether or not the employee receives a total permanent disability award.” *Id.* Moreover, since the parties had already entered into a stipulation and begun making payments, the award had already been liquidated. Therefore, whether the income benefits had been “specified and unpaid,” was not at issue in *Palomo*. Notably, the Court has never addressed the question of what is meant by “specified and

unpaid,” under § 72-431. Defendants contend that the interpretation of this term is at the crux of this case and dispositive.

Claimant’s reference to the Industrial Commission’s decision in *Havens v. ISIF* suffers from a similar defect. 2009 IIC 0745 (2009). The claimant in that case was permanently and totally disabled, and there was no issue of survivorship because the claimant was alive. The issue before the Commission was an allocation of liability between two sureties. *Havens* is clearly distinguishable from the present case.

This case presents a novel question which is one of first impression under Idaho law. The Industrial Commission itself so acknowledged in this case when it stated, “[t]he inheritability of disability benefits, including the disparate treatment of injured workers who are total and permanently disabled versus profoundly disabled, is a perplexing issue of some import, the resolution of which will provide helpful guidance to the workers’ compensation legal community. The Commission agrees that these matters are deserving of immediate review by the Court.” (R., Vol. I, p. 51).

In sum, the issue presented to the Court is a pure question of law. The question presented is one which the Industrial Commission agreed was deserving of review by this Court. Attorney fees are not appropriate in this instance.

## **2. This Court may analyze Equal Protection claims**

At the outset, it should be noted that Equal Protection is only at issue if the Court accepts Claimant’s interpretation of the statute. Defendants’ interpretation of § 72-431 is consistent with the Equal Protection Clause.

Claimant asserts that Defendants' Equal Protection arguments are unfounded because the Industrial Commission does not have jurisdiction to address constitutional challenges. Defendants agree that the Industrial Commission does not have jurisdiction to address constitutional challenges; however, this Court certainly does.

Claimant asserts that a rational basis is served by limiting the class of persons who can receive benefits thereby creating "certainty" for Idaho industry. Claimant's assertion that his interpretation of the statute somehow serves industry is completely at odds with its logical outcome. Allowing permanent partial disability benefits to survive the death of an injured worker would only promote uncertainty by enabling heirs to collect an unwarranted disability compensation windfall well beyond a worker's death.

**3. The statute is ambiguous**

Claimant argues that Idaho Code § 72-431 is plain and unambiguous. *Respondent's Brief* at 6. Claimant states, "Idaho Code § 72-431 is plain on its face. It allows the inheritability of permanent disability benefits when certain criteria are met." *Id.* Claimant provides no analysis of the text of the statute to support his assertion beyond applying it to various facts and asserting that it is applicable without any further explanation.

A statute is ambiguous where the language is capable of more than one reasonable construction. *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 139 Idaho 65, 68, 2 P.3d 905, 908 (2003). The Industrial Commission found more than one reasonable construction of the statute at issue here, with the dissent arguing that the majority's interpretation of the statute was incorrect.

The statute contains the term “disability” which has more than one meaning under Workers’ Compensation law. “Disability” is an umbrella term which can mean permanent partial disability, permanent total disability, temporary total disability, and temporary partial disability. “Disability” also has a different meaning depending on whether it is inclusive or exclusive of an impairment rating.

While “disability” is defined under Idaho Code § 72-102(10), the term “specified and unpaid” is not defined anywhere in Chapter 72. We know this term is significant because it is contained in the statute. “These words cannot be meaningless, else they would not have been used.” *United States v. Butler*, 297 U.S. 1, 65, 56 S.Ct. 312, 319 (1936) (per Roberts, J.) It is a cardinal rule of statutory interpretation that courts must give effect, if possible, to every clause and word of a statute. *See e.g., Williams v. Taylor*, 529 U.S. 362, 364, 120 S.Ct. 1495, 1498 (2000). The terms “specified and unpaid” have never been defined by an Idaho appellate court in this precise context. The meaning of § 72-431 changes depending on how one interprets the terms “specified and unpaid.”

Because § 72-431 is capable of more than one reasonable construction, it is an ambiguous statute under Idaho law.

#### **4. Idaho Code § 72-431 codified the common law on survivorship of benefits**

Claimant argues that the Legislature intended to abrogate the common law by enacting Idaho Code § 72-201, the exclusive remedy provision. This argument demonstrates a flawed understanding of § 72-201. This Code section simply provides that Workers’ Compensation is the

exclusive remedy for workplace injuries and prevents an employer from being sued in two separate venues.

If the Legislature had intended to abrogate the common law with respect to survivability, as Claimant suggests, why would it have enacted a statute that reflected the common law? Idaho Code § 72-431 limits survivability to benefits which are “specified and unpaid,” at death. The cases prior to the enactment of the statute made it clear that only a claim in the form of liquidated damages survives the death of a claimant. *See Appellants’ Brief* at 14-17. The Court stated in *Mahoney v. City of Payette*, referring to a scheduled disability award, “the *only* ground upon which such an award survives is that it was liquidated damages inuring to the benefit of the employee, becoming part of his estate, and *therefore not compensation for disability which might otherwise cease with his death.*” 64 Idaho 443 at 43, 133 P.2d 927, 929 (1943) (*emphasis added*). As the dissent summarized in the present case, “the cases stress that disability is a replacement for wages, and you do not earn wages after your death.” (R., Vol. 1, p. 38).

It is a familiar principle of statutory construction that any legislative change of the common law requires “exactness of expression,” and that a statute should not “be extended beyond the necessary and unavoidable meaning of its terms.” *Sharfeld v. Richardson*, 133 F.2d 340, 341, 76 U.S. App. D.C. 378, 380 (D.C. Cir. 1942). It is to be presumed that no change in the common law was intended unless language employed clearly indicates such intention. *Cox v. St. Anthony Bank and Trust Co.*, 41 Idaho 776, 242 P. 785 (1925). There is no language, express or otherwise, in the text of § 72-431 to suggest that the Legislature intended to change the common law. To the contrary, the text of § 72-431 mirrors the common law in effect at the time of its enactment.

**5. Claimant seeks a benefit that is not “specified” as required by statute**

The statute clearly limits benefits to those “specified and unpaid.” Claimant argues that permanent partial impairment is unliquidated in the same manner as permanent partial disability because the Commission retains the power to reject the opinion of a medical expert as to impairment. To support this proposition, Claimant cites to *Urry v. Walker and Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989). Claimant misapplies *Urry* to the present case. *Urry* is not a case about a liquidated award; *Urry* is a case about the weight accorded to expert testimony.

In *Urry*, the claimant had two distinct workplace injuries and received the same impairment rating- 20 percent whole person- for both from his treating physician. *Id.* at 752, 1124. Thus, claimant’s second injury was subsumed by the first and he was not entitled to any additional impairment compensation. *Id.* Claimant argued that he was entitled to additional compensation because his injury was no longer asymptomatic and pain caused him additional functional limitations. *Id.* On appeal, the employer argued the Commission should be bound to accept the opinion of claimant’s treating physician as conclusive. *Id.* at 755, 1127. The Court disagreed and held that the Industrial Commission, as a fact finder, could determine the appropriate weight to give to a physician’s expert testimony. *Id.* at 756, 1128.

The language of *Urry* that Claimant misapplies to the present case is simply a restatement of the general rule that a trier of fact can choose the appropriate weight to accord expert testimony. *Urry* is simply not applicable here.

In addition, Claimant perplexingly asserts that “Idaho Code § 72-431 does not require that income benefits are specified and unpaid when the employee dies.” *Respondent’s Brief* at 11. This statement is clearly and unequivocally at odds with the text of the statute itself. Idaho Code § 72-431 clearly states, “the income benefits specified and unpaid at the employee’s death.”

In making this argument, Claimant seems to be asserting that the language “whether or not accrued or due,” cancels out the requirement that the award be “specified and unpaid.” This argument is without merit. The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein. *Hartley v. Miller–Stephan*, 107 Idaho 688, 692 P.2d 332 (1984). Moreover, it is logically inconsistent that the Legislature would have included two contradictory terms within the same piece of statutory text.

Assuming Claimant is arguing that the two portions of this statute are in tension, this argument is also without merit, and is betrayed by the facts of the present case. When Claimant died, he had been given a permanent partial impairment award. (R., Vol. I, p. 7). The award was being paid out periodically over time. As such, the award was “specified and unpaid.” However, the full balance of the award was not “accrued and due” at the time of death. The surety continued to pay out the impairment award over time until it was paid in full. (R., Vol. I, p. 8). Thus, the impairment award had been “specified and unpaid,” but was not “accrued and due” when Claimant died.

**6. Legislative intent is reflected in the Model Act**

Claimant asserts that, “the only intent that can be discerned from the legislature with respect to the Model Act is that the legislature intended to depart from it, as evidenced by the I.C. § 72-431’s departure from the model language.” *Respondent’s Brief* at 11.

Claimant’s contention that the Legislature somehow departed from the language of the Model Act is unsupported by the text on its face. The text of the Model Act’s counterpart to Idaho Code § 72-431 is set forth in *Appellants’ Brief* at page 28. The dissent in the Industrial Commission decision here provided text of the Model Act with deletions and insertions made to generate Idaho Code § 72-431 as it was passed in 1971. (R., Vol. I, p. 39). One only has to examine the text of the Model Act in comparison to Idaho Code § 72-431 to see that the language is nearly identical.

The text of the Model Act references the section on scheduled impairment tables. The Model Act has a different numbering system than the Idaho Code, however, the section follows the tables in the Idaho Code as it does in the Model Act. As the dissent explained in the present case, “[i]t is inherently improbable that the drafters of the 1971 recodification used the Model Code section regarding survivability of impairment benefits, changing only a few words but intending it to result in an entirely different section which applied to disability instead of impairment. Further, if the intent was to apply to disability it seems the new law would have also included a provision for application to impairment.” (R., Vol. I, p. 40).



Claimant is incorrect in asserting that the Legislature chose to depart from the Model Act, because when one accounts for the numbering system, the language of Idaho Code § 72-431 is materially identical to the Model Act.

**7. Claimant misinterprets applicable persuasive authority**

Claimant cannot cite to any persuasive authority that supports his interpretation of the law. Claimant argues that *Larson's* treatise does not contain any persuasive authority because “Idaho is not other jurisdictions.” *Respondent's Brief* at 13. It is fundamentally appropriate for Courts to look to how other jurisdictions have analyzed a similar issue for persuasive authority when confronted with an issue of first impression. Moreover, the recodification of Workers' Compensation law which gave us the omnibus bill that included § 72-431 was part of a national recodification effort. *See generally*, Council of State Governments, *Program of Suggested State Legislation*, Preface to Section by Section Commentary (1965). The Model Act was used by many jurisdictions throughout the country in drafting their Workers' Compensation laws. The fact that Claimant cannot cite a single case for the proposition that disability in excess of impairment would survive a claimant's non-industrial death is significant and instructive.

Claimant argues that § 89.03, entitled “Unaccrued Payments,” is the more applicable portion of *Larson's* and cites to the following passage, “when, however, the award, although for a fixed number of weeks, is paid weekly or periodically, most jurisdictions in the absence of a special statute to the contrary have held that the heirs have no claim upon the unaccrued payments...” *Respondent's Brief* at 14.

Claimant asserts that § 72-431 is a “special statute,” but provides no analysis of why it would fall within the exception. Claimant’s argument is only persuasive if you ignore the fact that the statute requires the benefit to be “specified” in order to trigger survivability. The section cited by Claimant contains a footnote with one such state statute. Notably, the statute cited in this footnote as an example of a “special statute,” is a Missouri statute that applies exclusively to that state’s list of scheduled and unscheduled impairments. 7-89 *Larson's Workers' Compensation Law* § 89.03 (2015) (*referencing* Mo. Rev. Stat. § 287.230). Thus, the section cited by Claimant from *Larson’s* is entirely consistent with Defendants’ interpretation of § 72-431 and inconsistent with that offered by Claimant.

**8. There is no justification to depart from this Court’s holding in *Brown***

In *Brown* and *Davaz*, this Court held that an evaluation of permanent disability should reflect claimant’s personal and economic circumstances at the time of hearing. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012); *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 870 P.2d 1292 (1994). Defendants argued that the Commission’s 1988 decision in *Mary Martin v. Nampa Highway District* is no longer good law in light of these subsequent Supreme Court decisions. *Appellants’ Brief* at p. 35. Claimant responds that this Court’s decisions in *Brown* and *Davaz* provide “general rules” and should not be applicable to this case. *Respondent’s Brief* at 14.

The Court’s reasoning in *Brown* and *Davaz* is consistent with Defendants’ analysis of the facts of the present case. In these decisions, the Court recognized that permanent disability should be evaluated at the time of hearing because it is designed to compensate for the worker’s *present*

*and future* loss of earning potential. The Court in *Davaz* plainly stated that, “spirit of workers’ compensation law would not be served by awarding disability based on an antecedent, but no longer existing need.” 125 Idaho 333, 337, 870 P.2d 1292, 1296. There is no clearer example of “an antecedent, but no longer existing need,” than the present case in which the worker is deceased and has no present or future earning capacity.

In *Davaz v. Priest River Glass Co., Inc.*, the claimant relocated from Priest River to Missoula, Montana, where he obtained a job that paid as much or more than his time of injury employment. *Id.* at 337, 1296. Davaz argued that Priest River was his applicable labor market, as this would have presumably afforded him a higher percentage of permanent partial disability. *Id.* In rejecting Davaz’ argument, the Court noted, “[i]n this case, the facts clearly show that Davaz has no lost earning capacity,” and that “it would not serve the purpose of workers’ compensation law to award Davaz disability based on the market from which he and his family have permanently emigrated.” *Id.*

In *Davaz*, the Court acknowledged that “there may be instances where a market other than the claimant’s resident at the time of hearing is relevant...and such determinations should be made on a case by case basis based on individual facts and circumstances.” *Id.* at 337, 1296. The Court cited to the *Lyons* case as an example of when it might be appropriate to analyze a labor market other than the claimant’s labor market at the time of hearing. *Id.* (referencing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).)

In *Lyons*, the claimant moved into a labor market with fewer opportunities for employment. 98 Idaho 403, 565 P.2d 1360. The Court held that it was appropriate to consider both labor markets

because, “a claimant should not be permitted to achieve permanent disability by changing his labor market.” *Id.* at 407, 1364. The Court noted that “limiting the scope of consideration to the geographic area surrounding claimant’s new home would result in an unwarranted disability compensation windfall.” *Id.*

In *Brown v. Home Depot*, the issue was whether the claimant’s permanent disability should be measured at the time he reached medical stability or four years later when the hearing was held. 152 Idaho 605, 272 P.3d 577 (2012). The Court looked to the language of § 72-425, which defines permanent disability as a measure of the claimant’s present and probable future ability to engage in gainful activity. *Id.* at 609, 581. The Court reasoned that determining a claimant’s disability at the time of hearing served the purposes of the statute because, “there is no present opportunity for the Commission to make its determination apart from the time of hearing.” *Id.* The Court, citing to *Davaz*, reinforced that “it is the claimant’s personal and economic circumstances at the time of hearing, not some earlier time, that are relevant to the disability determination.” *Id.*

The Court allowed that there may be a limited exception to its holding, stating, “[w]e recognize that this holding, if not qualified, may create an incentive for litigants to seek to expedite or delay the hearing in order to take advantage of changing economic conditions.” *Id.* The Court made it clear that this was a limited exception and would apply “in an instance where the Commission perceives that a party has taken an action that has the effect of manipulating the outcome of a disability determination.” *Id.*

Thus, though the Court did qualify its holdings in *Davaz* and *Brown*, an exception is not appropriate in the present case. It is clear that the Court provided a limited type of exception out of

concern for parties engaging in gamesmanship or receiving an “unwarranted disability compensation windfall.” 98 Idaho at 407, 565 P.2d at 1364. This is the complete opposite of the present case, in which survivors of a claimant who has no present or future earning capacity would receive a windfall if disability was not evaluated at the time of hearing. Claimant provides no analysis of *Brown* or *Davaz* to explain to this Court why it should depart from its rule.


To the contrary, the Court’s reasoning in *Brown* and *Davaz* make it clear that it is appropriate to apply the holding to the present case. In both decisions, the Court repeatedly stressed that the purpose of disability is best served by evaluating a claimant’s personal and economic needs at the time of hearing. The Claimant in this case has no present or future loss of earning potential. The spirit of Workers’ Compensation and the purpose of disability would not be served by granting an unwarranted disability compensation windfall based on an antecedent but no longer existing need.

### **CONCLUSION**

Because the Industrial Commission erred as a matter of law in determining what benefits survive the death of an injured worker, Appellants respectfully request the Court reverse the decision in this case.

Respectfully submitted this 30 day of November, 2015.

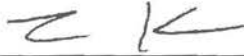
Law Offices of Kent W. Day

By:  \_\_\_\_\_  
Lea L. Kear  
Attorney for Defendants/Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of November, 2015, I caused a copy of the foregoing **REPLY BRIEF OF DEFENDANT/APPELLANTS** to be served by first class mail, postage prepaid, upon the following:

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\_\_\_\_\_  
Lea L. Kear